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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/813,292

Filing Date: March 21, 2001

Appellant(s): KRINGELUM ET AL.

Stephen A. Bent
For Appellant

EXAMINER'S ANSWER

Responsive to the Reply Brief on August 27, 2007, a supplemental Examiner's Answer is set forth below:

Claims 1 – 31 are pending and are under appeal.

Response to Arguments

In the Reply Brief filed on August 27, 2007, Appellant argues that the references do not teach a direct one step inoculation to produce the starter culture, but a stepwise inoculation. Appellant further argues that the claimed invention lowers risk of contamination, provides consistently high quality cultures and increased batch approval, reduces production costs, which is attested to by the inventor in a declaration. Appellant argues that the declaration filed on March 5, 2005 has been uncontested and unaddressed. Appellant appears to argue that a “single step method” is not claimed by appellant and that the examiner focuses on this limitation in error while agreeing with the examiner that practicing at different locations does not change the single step of inoculation. Appellant additionally argues that the examiner utilizes improper hindsight; that the references do not teach different propagation factories; that a consistent quality is not disclosed; and that the tests of claim 29 are not those disclosed by Christensen.

Regarding the direct, one step inoculation, it is clear by the cited references that the various media are directly inoculated with the stock inoculum. Sing specifically teaches inoculating the inoculum into culture media (abstract) and Kosikowski teaches mother cultures inoculated into growth media (col.1). Thus, it is maintained that in light of the teachings of the cited references, it would have been obvious to one of ordinary skill in the art to directly inoculate the various media with the stock culture.

Regarding the declaration, it is first noted that the examiner previously considered the declaration in the Non-Final Office Action mailed on June 28, 2004 as well as the Final Office Action mailed on July 7, 2006. The previous actions stated that the declaration was not found to be persuasive because the claims were not commensurate in scope with the data reflected in the declaration; that the standards are not equivalent making the data extremely unclear; and that the data does not appear to evidence that a culture with consistently high quality is an unexpected result, especially since the prior art suggests a consistent quality is achieved.

Regarding appellant's statements that the claims are not to a single step method, it is noted that appellant has consistently argued that the claimed invention is to a "direct, one step inoculation", or a single step type inoculation. Thus, in response to appellant's arguments, the examiner has also directed replies to the "single step" inoculation limitation. It is appreciated that the claimed method encompasses several steps in total, and that appellant regards the inoculation step as a "one step" (or single step) inoculation. Moreover, at the time of the claimed invention, in light of the teachings of the cited references, it would have been obvious to one of ordinary skill in the art to directly inoculate the various media with the stock culture.

Regarding appellant's statement that practicing at different locations does not change the single step inoculation, it is noted that appellant has previously argued that such a step is a "significant or material improvement" to the invention and is the cause of the cultures' consistent quality (see applicant's response filed on 4/17/2006 p.8 last paragraph). Moreover, appellant's current statement supports the examiner's previous arguments that the location of where the actual step of inoculation occurs does not patentably distinguish the method steps absent evidence to the contrary.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Regarding appellant's arguments to the different factories, it is reiterated that the rejections clearly state that while the references do not teach the subsets are provided to different factories and/or plants, the location of where the actual step of inoculation occurs does not patentably distinguish the method from those of the prior art. It is pointed out that the methods obtained by the combined teachings of the cited references suggests to one in the art that a stock inoculum can be divided into subsets as a matter of routine practice. Kosikowski clearly teaches common practices wherein mother cultures (starter cultures) are transferred (or inoculated) into multiple growth media. Each growth medium could reasonably be interpreted as its own propagation factory of the starter culture as each medium is in a separate location. Further, since the references teach that the starter cultures are used to inoculate multiple media, one in the art would have been motivated to inoculate different media with a reasonable expectation for successfully supplying a starter culture of consistent quality. Whether the inoculation occurs on the same media, different media, different rooms, different locations or even different factories and/or plants, the step of inoculating a starter culture into multiple, separate and different media is still practiced. Thus, the step of inoculating multiple growth media from a single starter

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culture is suggested and practiced by the prior art. Moreover, the location of where the actual step of inoculation occurs does not patentably distinguish the method steps absent evidence to the contrary.

Regarding appellant's argument that a consistent quality is not disclosed, the method obtained by the combination of cited references clearly identify and suggest to one in the art that a single starter culture can be used to inoculate multiple growth media. Thus, one in the art would expect a consistent quality between the various media that are inoculated by the starter culture. In addition, Christensen further supports the practice of obtaining cultures with consistent quality by using a starter culture.

Regarding appellant's arguments to claim 29, it is first noted that the Christensen reference teaches activity tests, plate count, or a count of total viable cells, which is claimed by appellant. These limitations have been presented and argued by the examiner in previous Office Actions to include the Final Action mailed on July 7, 2006. Regarding the activity tests, it was emphasized that such tests may include metabolic activity and/or fermentation tests in response to appellant's arguments presented in the Appeal Brief. Moreover, in contrast to appellant's assertions, the argument was made by the examiner prior to the Examiner Answer mailed on June 27, 2007, and was therefore not a new argument. Even if the reference does not each of the claimed tests, the reference clearly teaches a plate count, as claimed by appellant. Moreover, Christensen clearly teaches plate counts (count of total viable cells) in addition to activity tests (which may include metabolic activity and fermentation tests as claimed) (col.6), which evidences that the specific tests were clearly known in the art and practiced as quality control measures with starter cultures. While the reference suggests that by practicing these quality tests

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on the starter cultures, a higher quality of food product can be obtained, the reference still clearly teaches the tests ensure quality of the starter culture itself (col.6).

Appellant may file another reply brief in compliance with 37 CFR 41.41 within two months of the date of mailing of this supplemental examiner's answer. Extensions of time under 37 CFR 1.136(a) are not applicable to this two month time period. See 37 CFR 41.43(b)-(c).

A Technology Center Director or designee has approved this supplemental examiner's answer by signing below:

/Ruth A. Davis/
Primary Examiner, AU 1651



BRUCE KISLIUK, DIRECTOR
TECHNOLOGY CENTER 1600